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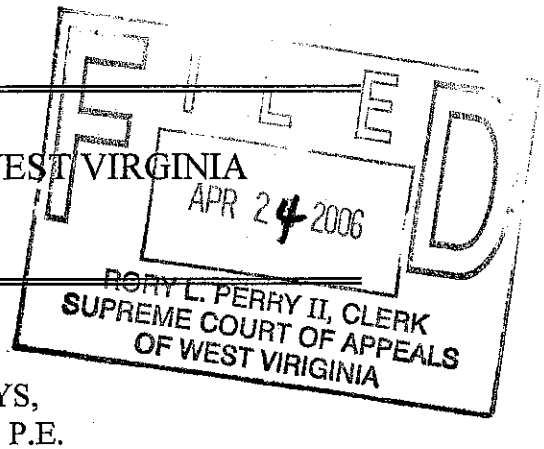

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,
a Public Corporation, and FRED VANKIRK, P.E.
SECRETARY/COMMISIONER OF HIGHWAYS,

Petitioners,

v.

THE HONORABLE DONALD H. COOKMAN,
Judge of the Circuit Court of Hardy County,
West Virginia,

Respondent.

From the Circuit Court of
Hardy County, West Virginia
Civil Action No. 04-C-51

PETITION FOR WRIT OF PROHIBITION

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I. ISSUES PRESENTED

The present Petition arises from an Order issued by Respondent Judge Cookman as a result of a hearing held before His Honorable Court on April 5, 2006, concerning a Motion to Compel Discovery, filed by Defendant below in this condemnation litigation matter. After reviewing the legal memoranda submitted by the parties and following oral argument concerning the same, Respondent held that Fort Pleasant was entitled to; (1) copies of all appraisal reports and other evaluations for the subject property prepared for Petitioners by non-testifying experts and/or consultants, and (2) appraisals and evaluations prepared by testifying experts of Petitioners for other condemned properties associated with the Corridor H project. (*See Respondent's April 13, 2006, Order, attached hereto as Exhibit "A."*)

Respondent concluded that reports from non-testifying experts and/or consultants are discoverable even though Fort Pleasant did not satisfy its burden of showing any exceptional circumstances in order to justify a request for the same as required by W. Va.R.Civ.P. 26(b)(4)(B). In reaching its determination concerning the discovery of appraisals for other condemned properties, Respondent ignored the fact that federal law precludes the production of such materials and that appraisals are wholly irrelevant and beyond the scope of discovery. Moreover, Respondent failed to recognize that, even if such materials were discoverable, Petitioners have qualified immunity with respect to materials which are part of ongoing condemnation proceedings.

If left undisturbed, Respondent's rulings and their resulting precedent, will have a chilling effect upon Petitioners' statutory right to take private property for public use. Petitioners' ability to effectively negotiate and convert lands necessary for critical public projects, such as the Corridor H

highway project at issue in this case, will be severely impaired if they are required to publicize unrelated appraisals and evaluations. Failing to recognize that each parcel of real estate is unique, and that each possesses different elements and characteristics which define its value, condemnees, who are not generally schooled in the intracacies of valuation of real estate, will believe that their property should receive the same valuation as their neighbor's property. This "I want want they've got" mentality will cause eminent domain condemnation proceedings to become even more litigious and contentious; this is exactly what the West Virginia Legislature endeavored to prevent went it implemented the Uniform Relocation Assistance and Real Property Acquisition Policies Act. W. Va. Code §54-3-2. Thus, Petitioners have no choice but to now seek relief from this Court.

II. PROCEEDINGS AND RULINGS BELOW

The present civil action stems from the June 2004 condemnation of 48.24 acres from a 160 acre tract of real estate owned by Defendant below, Fort Pleasant Farms, Inc. (hereinafter "Fort Pleasant"), taken for use in the Corridor H project. On December 14-15, 2005, a Commissioners' hearing was held. After viewing the subject property, and after considering the evidence presented by the parties at the hearing, the Commissioners determined that the sum of $1,100,600.00 was just compensation for the lands and interests acquired, including for damages to the residue of the real estate beyond the benefits to be derived. Both Petitioners and Fort Pleasant filed exceptions to the Report of Commissioners.

Following the Commissioners' Hearing, Respondent entered a Second Amended Agreed Scheduling Order. Pursuant to this Scheduling Order, Petitioners are to fully disclose their expert witnesses by May 15, 2006, and Fort Pleasant by until May 30, 2006. A trial date has not been

selected, but the Court intends to schedule trial during the July term of the Hardy County Circuit Court.

Prior to the Commissioners' Hearing in December, the parties participated in limited, written discovery. The parties each identified expert witnesses, and expert reports and appraisals associated with the subject property were exchanged. Both parties were aware that discovery was ongoing, and that these disclosures were not conclusive.

Apparently dissatisfied with the reports and appraisals that were initially exchanged, Fort Pleasant filed its *October 27, 2005 Interrogatories and Request for Production to Petitioner* consisting of two interrogatories and one request for production of documents concerning experts, non-testifying experts and consultants, and appraisals for other condemned properties prepared by testifying experts. On November 28, 2005, Petitioners responded to this second set of discovery requests and outlined their objections to the same. Petitioners maintained that the discovery requests sought information that was clearly outside the scope of admissible evidence in a condemnation matter, specifically the identity and opinions of non-testifying experts and/or consultants. (See Exhibit "B" attached hereto). Without waiving their objections, Petitioners did provide a limited response concerning their experts by referring Fort Pleasant to their response to the first set of discovery requests propounded upon them, which identifies all of their experts. (See a copy of these initial responses attached hereto as Exhibit "C").

Interrogatory No. 1 of Fort Pleasant's October 27, 2005, discovery requests specifically asked:

> Identify each and every expert witness or potential expert witness Petitioner or its counsel have consulted or communicated with in any fashion, and/or retained in

connection with this case, whether or not Petitioner intends to use or call such person as a witness, who have not be previously disclosed.

Since Interrogatory No. 1 sought the identity of "potential" expert witnesses, Petitioners objected to this request in reliance upon prevailing case law construing W. Va.R.Civ.P. 26(b)(4). In its Motion to Compel, Fort Pleasant contends that this request was intended to identify "all such persons who may have appraised the subject property or minerals for Petitioners, if not previously disclosed, so that Fort Pleasant could thereafter obtain their appraisals, if any." Fort Pleasant did not identify any reason why this information was necessary, especially in light of the fact that Petitioners had already provided the appraisals and evaluations of the subject property for witnesses that they intended to use at trial. Although Fort Pleasant failed to demonstrate that it had any justification for the discovery of this information, Respondent ordered Petitioners to produce it. In addition, Respondent, in his April 13, 2006, Order, *sua sponte* ordered Petitioners to produce copies of any and all appraisal reports and other evaluations prepared by these "potential experts," even for non-subject matter properties.

During the course of discovery in this matter, Fort Pleasant has also attempted to obtain condemnation appraisals for other properties in the immediate vicinity of the subject property on two separate occasions. On November 12, 2004, Fort Pleasant filed its *First Set of Interrogatories and Request for Production to Petitioners*. In these requests, Fort Pleasant requested that Petitioners identify all of their appraisal witnesses who have appraised other properties within one mile of the subject property and provide a copy of said appraisal. Petitioners objected to this request and Fort Pleasant filed a Motion to Compel on December 23, 2004. By Order dated February 15, 2005, following a hearing on the matter, Respondent granted Fort Pleasant's Motion to Compel . Rather

than seek a Writ of Prohibition at that time, Petitioners filed a Motion to Alter or Amend the Court's Order. Subsequently, Fort Pleasant agreed to withdraw the discovery request. The parties filed an Agreed Order to this effect, and the Court entered that Order on March 15, 2006.

In blatant disregard for the Agreed Order to withdraw any request for appraisals of other parcels of real estate within one mile of the subject property, Fort Pleasant renewed its request for the same in its *October 27, 2005 Interrogatories and Request for Production to Petitioners*. In Interrogatory No. 2 of Fort Pleasant's October 27, 2005 discovery requests, Petitioners were asked:

> Have any of the persons identified as expert appraisal witnesses or potential expert witnesses appraised other properties for the Petitioner of a similar nature (properties having a highest and best use as residential, commercial and/or industrial development properties), which are located within one-half mile of the subject? If so, identify each such person, and provide a copy of all appraisal reports as to each of said properties.

Although the request was limited to the appraisals of properties within one-half mile of the subject, the same objections applied and Petitioners objected to the interrogatory. Fort Pleasant filed a Motion to Compel with the Court and a hearing was held on April 5, 2006. Respondent concluded that the appraisals for other properties within one-half mile of the subject matter were discoverable and should be produced. Respondent did specify that his ruling did not mean he would allow such evidence to be introduced at trial.

III. ASSIGNMENTS OF ERROR

1. Did Respondent exceed his jurisdiction by ordering the production of appraisals and evaluations of the subject property from non-testifying experts and/or consultants without a demonstration by Fort Pleasant of exceptional circumstances to justify a need for the same?

2. Did Respondent exceeded his jurisdiction by ordering the production of appraisals and evaluations pertaining to other condemnation cases of the Corridor H project in direct contravention of federal law?

3. Did Respondent abuse his discretion when he determined that all appraisal reports and evaluations pertaining to other properties acquired for the Corridor H project, which are located within one-half mile of the subject property, conducted twelve (12) months before and after the date of take of the subject by property by Petitioners' witnesses constitute relevant and proper discovery?

4. Did Respondent abuse his discretion by disregarding the qualified immunity afforded to Petitioners with respect to the confidentiality of certain appraisals of other condemned parcels of real estate by ordering production of the same, even though they are presently part of ongoing condemnation proceedings and/or negotiations with non-parties?

IV. ARGUMENT

A. Prohibition is the Only Remedy to Correct a Clear Legal Error.

Pursuant to West Virginia Code §53-1-1, a "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." In that regard, a writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court, although having jurisdiction, exceeds its legitimate powers. See *State ex rel. Abraham Linc. Corp. v. Bedell*, 216 W. Va. 99, 602 S.E.2d 542 (2004).

While it has been clearly established in West Virginia that a writ of prohibition will not issue to prevent a "simple misuse" of discretion by a trial court, it is clearly available when a trial court substantially abuses its discretion with respect to discovery orders. See *State ex rel. Westbrook Health Services, Inc. v. Hill*, 209 W. Va. 668, 550 S.E.2d 646, (2001). Moreover, as noted by this Court in *State ex rel. West Virginia State Police v. Taylor,* 201 W. Va. 554, 499 S.E.2d 283 (1997), when a writ of prohibition raises the invasion of confidential materials which are exempted from discovery, discretionary exercise of this Court's original jurisdiction is appropriate.

In the instant matter, Respondent exceeded any legitimate power by ordering the production of reports from non-testifying experts, and of immaterial and confidential appraisals for properties which are not a part of the condemnation in the underlying matter. Moreover, Respondent ignored federal law and prevailing case law in reaching his conclusions.

In determining whether to grant a rule to show cause in prohibition based on abuse of discretion, this Court "must consider the adequacy of other available remedies such as appeal and the over-all economy of effort and money among litigants, lawyers and courts." See *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). In the matter *sub judice*, there is no other remedy available. In that regard, immediate relief from this Court is necessary to prevent the dissemination of irrelevant, immaterial and confidential non-party materials.

B. Respondent Clearly Exceeded His Jurisdiction by Ordering the Production of Appraisals and Evaluations from Non-testifying Consultants Without the Requisite Demonstration of Exceptional Circumstances

In *W. Va. Dept. of Highways v. Brumfield*, 170 W.Va. 677, 295 S.E.2d 917 (1982), this Court decided to extend a "limited right of discovery" in condemnation cases. (emphasis added). Specifically, this Court extended the discovery rights contained in Rule 26(b)(4) of the West Virginia Rules of Civil Procedure to eminent domain cases. Thus, condemnation cases are, at a minimum, under the same limitations on the discovery of opinions from an expert who is not expected to testify at trial that have been placed upon civil actions. In that regard, the West Virginia Rules of Civil Procedure specifically provide that:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which

it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

W. Va.R.Civ.P. 26(b)(4)(B)

There are numerous reasons why a party would retain an expert on a certain subject in litigation without designating the expert as a trial witness. Most often, especially in complete or unique litigation matters, counsel will hire a non-testifying consultant in order to obtain expert advice concerning the handling of the matter. In addition, a party may decide not to call a retained expert as a trial witness if the court has placed a limit on the number of experts who can be called at trial or if the party concludes that too much expert testimony would overwhelm the jury. A party may also decide to reclassify a testifying expert as a non-testifying witness, if the party determines that the expert's demeanor or appearance would not make a good impression before the jury, that the expert's testimony is not helpful, or for a variety of other reasons. In a similar vein, Petitioners, prior to the initiation of the underlying condemnation and thereafter, have consulted with a variety of individuals having expertise in certain fields who they have determined (or may determine) will not be testifying expert witnesses.[1] Regardless of the reason for retaining the non-testifying expert, W. Va.R.Civ. P. 26(b)(4)(B) places a partial ban upon the discovery of this information.

Interpreting Rule 26(b)(4)(B), this Court in *Michael v. Henry*, 177 W. Va. 494, 354 S.E.2d 590 (1987), by reference to the Southern District Court in *Barnes v. City of Parkersburg*, 100 F.R.D. 768, (S.D.W. Va. 1984), acknowledged that consultants or non-testifying experts are subject to "a more restrictive discovery standard." In *Michael,* a medical malpractice plaintiff sought a writ of prohibition because the trial court, in ruling upon a Motion to Compel, ordered that the names and

[1] Petitioners would reiterate that the Respondent's ruling was entered before expert disclosures were even due pursuant to this Court's Second Amended Scheduling Order.

reports of non-testifying experts be disclosed to the Defendant Fort Pleasant. Comparing the identical language of Fed.R.Civ.P. 26(b)(4)(B) to W.Va.R.Civ.P. 26(b)(4)(B), this Court determined that before discovery can take place with respect to experts that are not expected to testify, the moving party has the burden of "showing exceptional circumstances justifying the discovery." Applying this standard, this Court found that the defendants did not satisfy their burden. This Court noted:

> [T]he respondents have not sustained the burden of showing exceptional circumstances justifying the discovery of relator's non-testifying experts. The respondents have available to them the decedent's medical records, and have failed to show that they are unable to retain an expert who might interpret these records and render an opinion regarding respondents' possible negligence. Because the respondents failed to meet their burden under Rule 26(b)(4)(B), the circuit court abused his discretion by requiring the relator to disclose the identities and reports of his non-testifying experts.

Michael v. Henry, 177 W.Va. at 498, 354 S.E.2d at 594.

The Southern District Court in *Barnes* reached the same conclusion in a medical malpractice case. The plaintiff requested that the Southern District Court enter an Order prohibiting the defendants from taking the evidentiary deposition of a physician who the plaintiff retained in anticipation of litigation but did not intend to call as a witness at trial. The defendants maintained that "exceptional circumstances" existed because they were unable to obtain the opinions of the consulting experts by any other means. The District Court rejected this argument, stating that "the Rule clearly contemplates a showing that a party has found opinions by *others* on the subject to be *unavailable* before he may obtain discovery from his opponent's retained expert who is not expected to be called to testify on the same subject." (Emphasis added.) Thus, the Southern District Court found that the defendant had not met the "heavy burden" of showing exceptional circumstances

incumbent upon a party seeking discovery of a non-testifying expert. In granting the motion for protective order, the Southern District Court specifically stated that:

> "These experts are subject to a more restrictive discovery standard. For experts not expected to testify, the rule is that discovery can only take place upon a showing of "exceptional circumstances" under which it is "impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means" ... The reason for this rule is that while pretrial exchange of discovery regarding experts to be used as witnesses aids in narrowing the issues, preparation of cross examination and the elimination of surprise at the trial, there is no need for a comparable exchange of information regarding non-witness experts who act as consultants and advisors to counsel regarding the course the litigation take." (Internal citations omitted.)

Barnes v. City of Parkersburg, 100 F.R.D. at 769 (D.C.W.Va.,1984).

One of the leading appellate decisions on this issue, as relied upon by the Southern District Court in *Barnes*, is *Marine Petroleum Co. v. Champlin Petroleum Co.* 641 F.2d 984, 206 U.S.App.D.C. 31 (C.A.D.C.,1979). In this matter, the discovering party maintained that it was entitled to take discovery from a non-testifying expert because absent such discovery, it could not obtain further information regarding the opinions held by the expert. Rejecting this argument, the United States Court of Appeals for the District of Columbia held that "exceptional circumstances" exist only if information on the "same subjects" cannot be obtained by other means. The Court explained that these "same subjects" are not the expert's opinions but are instead the topics and subject areas of the expert's investigation. The Court therefore held that where a party has retained experts on the same topics or subject areas as the opposing party's non-testifying experts, exceptional circumstances permitting discovery would rarely exist.

Thus, the prevailing test for exceptional circumstances is the inability of the discovering party to obtain equivalent information from other sources.[2] In that regard, the majority of Courts have held that the party seeking disclosure under Fed.R.Civ.P. 26(b)(4)(B) carries a heavy burden in demonstrating the existence of exceptional circumstances. *Hoover v. United States Dept. of the Interior*, 611 F.2d 1132 (5th Cir. 1980); *In re Shell Oil Refinery*, 132 F.R.D. 437 (E.D. La. 1990). Fort Pleasant failed to satisfy this burden in the underlying proceedings, in fact, it introduced no evidence or made no argument to meet this burden and it cannot do so now. Additionally, Fort Pleasant did not make any showing in the underlying proceedings that the requested information cannot be obtained from other sources. In fact, it has its own experts who can provide this information.

Generally, condemnation proceedings are very straightforward because West Virginia eminent domain law specifically limits the issues to be determined at trial. The only issue to be determined at trial by a jury of twelve freeholders is the appropriate amount (just compensation) that should be recovered by the landowner because of the take. As noted by this Court, in the oft cited case of *State, by State Road Commission, v. Snider*, 131 W.Va. 650, 49 S.E.2d 853 (1948), "[t]he rule is that the measure of recovery is the fair market value of the land actually taken at the time it was appropriated, plus the difference between the fair market value of the residue of the land immediately before and immediately after the taking, beyond all benefits which may accrue to the residue from the construction of the improvement for which the land is taken and damaged."

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[2] *See Marine Petroleum, supra*; *Candebat v. Zimmer, Inc.*, 1990 WL 43922.(E.D. La. 1990); *Sabido v. ANR Freight System, Inc.*, 1988 WL 58408...(E.D. La. 1988); *United States v. Hooker Chemicals & Plastics Corp.*, 112 F.R.D. 333, 338 (W.D. N.Y. 1986); *Grindell v. American Motors Corp.*, 108 F.R.D. 94, 95 (W.D. N.Y. 1985); *Mantolete v. Bolger*, 96 F.R.D. at 181; *Puerto Rico Aqueduct v. Clow Corp.*, 108 F.R.D. 304, 310 (D. P.R. 1985). *In Re Shell Oil Refinery*, 132 F.R.D. 437, 442 (E.D. La. 1990).

Since the issues are statutorily narrowed in condemnation cases, the subject matter of expert testimony is generally consistent from case to case. Typically, condemnation proceedings will only involve expert testimony concerning the value of the property before and after the take. However, on occasion, as with the case at hand, expert testimony may be required concerning minerals upon the property and to establish whether the property has been inherently damaged as a result of the construction of the improvement for which the land was taken. Regardless of the circumstances surrounding the condemnation matter, the information relied upon by such experts is equally available to the parties because they are based upon a view and study of the condemned property. In that regard, Fort Pleasant cannot satisfy the "exceptional circumstances" standard. Equivalent information concerning the subject property is available to both parties, the foremost of which is simply a study and analysis of the subject property itself. The same information relied upon by Petitioners' experts and non-testifying consultants can be obtained by Fort Pleasant through a variety of other means.

In the present matter, there are three potential subject areas that will (or may) require expert testimony. Obviously, the Petitioners and Fort Pleasant have not been able to agree as to the value of the property before and after the take, so each side has had the property appraised. During the appraisal process, a dispute arose as to the valuation of shale found on the property so the minerals have been tested and evaluated by experts. Finally, Fort Pleasant contends that the construction of the take has detrimentally affected the drainage of water on the residue of the property and has further diminished its ability to utilize the property for its highest and best use. In that regard, Fort

Pleasant has retained experts to testify as to the damage to the property. Petitioners have not yet determined whether it will retain any experts for these areas.

Despite the fact that discovery is still ongoing and expert disclosures are not due, the parties have already made preliminary expert disclosures, and reports where prepared, have been exchanged. In response to Interrogatory No. 2 of Fort Pleasant's First Set of Interrogatories and Request for Production of Documents, Petitioners identified the following experts: Kent Kesecker, Appraiser; Larry J. Puccio, Appraiser; Richard Eldridge, Review Appraiser; Charles G. Howard, P.E., Mineral Appaiser; George A. Chappell, Sr., Mineral Review Appraiser; William F. Henrichs, III, Chief Review Appraiser; J.R. Bradford, Review Appraiser; Gary Read, Engineer; and Naji Banna, Engineer. (See response to Request No. 2 of Fort Pleasant's First Set of Interrogatories and Request for Production of Documents, attached hereto as Exhibit "C.") To the extent that these experts prepared written reports, they have been provided to Fort Pleasant. During the Commissioners' Hearing, Petitioners only presented the testimony of Mr. Bradford.

Additionally, Petitioners made available to Fort Pleasant all environmental documents, including the project Environmental Impact Statement, historical studies and other documentation concerning the Corridor H project. (See response to Request No. 3 of Fort Pleasant's First Set of Interrogatories and Request for Production of Documents, attached hereto as Exhibit "C.")

Fort Pleasant has identified seven experts, Vernon Webster, Appraiser; Larry N. McDaniel; Mickey G. Petitto, Appraiser; William L. Toney, Jr., P.E., Engineer; Tim Sedosky, Engineer; M. Hugh Hefner, Geologist; and an unknown representative from Baker Engineering. Reports were prepared by Mr. McDaniel, Ms. Petitto, Mr. Toney, Mr. Sedowsky and Mr. Hefner and these have all

been provided to Petitioners. Moreover, Fort Pleasant relied upon the testimony of Mr. McDaniel; Mr. Toney, Mr. Sedosky and Mr. Hefner at the Commissioners' Hearing.

Despite having (1) already retained seven experts; (2) relied upon the testimony of certain of these experts at the Commissioners Hearing; and (3) failed to demonstrate that it is somehow unable to retain an expert who might interpret a certain subject area or topic pertaining to the instant matter, Fort Pleasant continues to seek the identity of non-testifying consultants and/or experts and any reports they have prepared. Clearly, Fort Pleasant has not been hindered in their preparation of this matter, and is only seeking this information in order to invade the mental impressions of counsel and to build its own case by means of Petitioners' resources, diligence and preparation. W. Va. R.Civ.P. 26(b)(4)(B) was drafted to prevent these very abuses.

In that regard, Fort Pleasant has not satisfied its burden of showing **"exceptional circumstances"** in order to justify its request for information pertaining to non-testifying experts as required by W. Va.R.Civ.P. 26(b)(4)(B). Thus, they are not entitled to any information concerning consultant experts that will not or may not be utilized by the Petitioners at trial and the Respondent abused his discretion by ordering the production of the same.

C. Respondent Clearly Exceeded His Jurisdiction by Ordering the Production of Appraisals and Evaluations Pertaining to Other Condemnation Matters in Direct Contravention of Federal Law.

The Motion to Compel submitted by Fort Pleasant, and presumably relied upon by Respondent, cites several jurisdictions which have decreed reports prepared for a condemning authority for comparable properties by appraisers that will testify, generally discoverable. However, each case cited by Fort Pleasant is distinguishable from the case at hand. First and foremost, none of

the cases relied upon by Fort Pleasant involved a federally assisted highway project and the Uniform Relocation Assistance and Real Property Acquisition Policies Act, (42 U.S.C.A. §4601, et seq., hereinafter referred to as the "Federal Act".) Actually, many of the cases relied upon by Fort Pleasant predate the Federal Act.[3] Since Corridor H is a federally assisted highway project, consideration must be given to federal law.

Pursuant to 42 U.S.C. §4655(a), the Federal Act requires that a state agency comply with the Federal Act's policies whenever the agency seeks federal financial assistance for "any program or project which will result in the acquisition of real property." Moreover, W. Va. Code, §17-2A-20 specifies that Petitioners "shall provide a relocation assistance program that must comply with and implement the federal laws and regulations relating to relocation assistance to displaced persons as set forth in the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970." In addition, the West Virginia Legislature enacted W. Va.Code §54-3-3 which makes the federal real property acquisition policies applicable to all state agencies with powers of eminent domain. See also, *Huntington Urban Renewal Authority v. Commercial Adjunct Co.*, 161 W. Va. 360, 242 S.E.2d 562 (1978).

Under the Federal Act, as it is required to be followed by Petitioners in the Corridor H project, a landowner is not even entitled to a complete copy of the appraisal performed upon ***his own property***. According to 42 U.S.C.A. §4651(3), the condemning agency is only required to furnish the landowner with a written statement and summary of the basis for the amount established as just compensation. Addressing this issue, the Court for the Western District Court of Kentucky, in *Wise*

[3] See *Sullivan v. State*, 292 N.Y.S.2d 244 (N.Y.Ct.Cl. 1968); *State v. Hartman*, 338 S.W.2d 302 (Tex.Civ.App. 1960); *Board of County Comm's v. H.A. Nottingham & Sons, Inc.*, 540 P.2d 1126 (1975); *Georgia Neurosurgical Clinic v. Rockdale County*, 453 S.E.2d 88 (Ga.App. 1994) and *Ryan v. Davis*, 109 S.E.2d 409 (Va.1959).

v. United States, 369 F.Supp. 30 (W.D.Ky, 1973), found the plain wording of the statute persuasive, and held that the federal Act does not require that a full appraisal report be furnished to the landowner for projects under the purview of the Federal Act. Although not required, it is Petitioners' policy to exchange appraisals and comparable sales data for the property at issue, as was done in the underlying matter. However, the mere fact that the Federal Act does not mandate that a landowner be provided appraisals for his own property is very telling when considering whether comparable appraisals of other properties in a project should be disclosed.

Concerning confidentiality of documents associated with federally assisted projects, the Federal Ac states:t

> (b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9 (b). No law provides otherwise.

While this Court has interpreted portions of the Federal Act[4], it has never considered 49 C.F.R. § 24.9(b). In fact the only Court that has reviewed this portion of the Federal Act is the Nevada Supreme Court in the case of *In City of Reno v. Reno Gazette-Journal* 63 P.3d 1147 (Nev. 2003). In this matter, a newspaper, pursuant to Nevada's Public Records Act, sought the disclosure of documents relating to the acquisition and relocation of a railroad, a federally assisted project. Included as part of the newspaper's request were the appraisal values for each of the thirty-two parcels of property to be acquired by the City and all documentation related to these appraisals. The City denied the request on the basis of confidentiality. Subsequently, the newspaper filed a writ of

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[4] See *Huntington Urban Renewal Authority v. Commercial Adjunct Co., supra* and *West Virginia Dept. of Transp., Div. of Highways v. Dodson Mobile Homes Sales and Services, Inc.*, 218 W.Va. 121, 624 S.E.2d 468 (2005).

mandamus concerning the disclosure of these documents and the trial court granted the petition. On appeal, the Nevada Supreme Court determined that the requested documents were declared confidential by law and that the documents were thereby exempt from disclosure under the Nevada Public Records Act. Interpreting 49 C.F.R. § 24.9 (b), the Nevada Supreme Court stated:

> This regulation plainly makes records involved in the acquisition of real property for federally funded programs confidential, and not public information, unless there is a law providing that they are not confidential . . . Here, the federal regulation specifically provides that these records are 'confidential regarding their use as public information, unless applicable law provides otherwise.'. . . Acquisition records have been declared confidential under 49 C.F.R. § 24.9(b), which was adopted by statute into Nevada law.

City of Reno v. Reno Gazette-Journal, 63 P.3d at 1150 (Nev.,2003).

While the facts in *In City of Reno* are certainly distinguishable from the facts at hand as this Court is faced with an abuse of discovery issue, rather than an issue relating to the the West Virginia Freedom of Information Act, the same principles apply. Because of Corridor H's status as a federally assisted highway, Petitioners are statutorily required to adhere to the regulations set forth in the Federal Act. Thus, any records, including those related to appraisals, would remain confidential unless the State has made an independent determination whether public records covered under the Federal Act should not be deemed confidential. The West Virginia Legislature has not enacted any statute to lift the confidential label that has been placed by the Federal Act upon appraisals and/or other evaluations which are prepared for federally assisted projects. Likewise, Petitioners have not implemented any such regulations.

Even if the appraisals and reports sought by Fort Pleasant were discoverable under the West Virginia Rules of Procuedure, , 49 C.F.R. § 24.9(b) would serve to preempt their disclosure. In that

regard, Respondent abused his discretion by ordering Petitioners to produce appraisals and evaluations that have been declared confidential by the Federal Act.

D. Respondent Clearly Abused His Discretion by Requiring the Production of All Appraisal Reports and Evaluations Pertaining to Other Properties Within a Half Mile Radius of the Subject Property, Which Were Acquired for the Same Public Project, Without Regard to the Unique Aspects of Real Estate Which Define Each Parcel as *Sui Generis* .

Appraisals and evaluations which have been prepared on behalf of Petitioners for other properties affected by Corridor H are irrelevant, immaterial and will not lead to the discovery of admissible evidence. Rather than assist the trier of fact, this superfluous information will only further complicate and convolute the underlying matter since the only issue to be determined at trial is that of just compensation.

While Petitioners recognize that under W.Va.R.Civ.P. 26(b)(1), the information sought by Fort Pleasant need not be admissible at trial, at a minimum, it must appear "reasonably calculated to lead to the discovery of admissible evidence." As the Eighth Circuit noted in *Hofer v. Mack Trucks, Inc*, 981 F.2d 377 (8th Cir. 1992):

> While the standard of relevance in the context of discovery is broader than in the context of admissibility, this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.

The question of whether the information sought is discoverable ultimately depends on the facts and circumstances of the particular case. Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §2009. On this basis, the discovery sought by Fort Pleasant is clearly beyond the scope of discovery.

In a real estate context, an appraisal is defined as the act or process of estimating value. Part of the appraisal process is the gathering, analysis and interpretation of information related to a specific property's use, quality, value and/or utility. The appraiser then formulates his estimation of market value based upon this information. The Appraisal of Real Estate (American Institute of Real Estate Appraiser, 12th ed., 2002). In that regard, an appraisal has been described by the United States Supreme Court as "at best, a guess by informed persons." *U.S. v. Miller,* 317 U.S. 369,63 S.Ct. 276 (U.S. 1943).

Thus, by their very nature, appraisals of real estate are entirely project specific, the factors considered, and methodology used will vary from property to property. Accordingly, the only similarities between the property at issue in the underlying proceeding and other condemned properties within one-half mile is that they were each affected in some manner by Corridor H.

Despite Petitioners objections, Respondent determined that "the requested appraisal and evaluation reports and information, which are related to the Corridor H project, are all relevant in point of time, and to the issues to be tried in this proceeding." While Respondent has not determined that he will allow evidence related to appraisals of other property to be introduced as evidence at trial, the discovery should still not be had because the appraisals in question are clearly outside the scope of the subject matter and will only serve to prejudice and prolong the litigation. In that regard, Respondent abused his discretion when he determined that the appraisals and evaluations prepared for properties within one-half mile of the subject property were relevant and discoverable.

E. Respondent Clearly Abused His Discretion by Ignoring and Effectively Abrogating the Qualified Immunity Afforded to Petitioners with Respect to the Confidentiality of Appraisals of Parcels Subject to Pre-condemnation Negotiations or Formal Condemnation Proceedings.

Notwithstanding the fact that disclosure of appraisals and evaluations for other parcels of a project is precluded by state and federal law and are otherwise irrelevant, Petitioners also enjoy a qualified immunity concerning the disclosure of same. Complete compliance with Respondent's April 13, 2006, order would require the production of eleven (11) appraisals. While the production of eleven (11) appraisals is not onerous, it is not inconsequential. The fact that each of these appraisals is pre-decisional with negotiations and condemnations proceedings presently ongoing is extremely prejudicial. Moreover, three (3) of the appraisals at issue pertain to parties who are represented by one or more of the attorneys representing Fort Pleasant herein. Thus, the disclosure of these appraisals would be highly prejudicial to Petitioners and would only serve to undermine their ability to fairly and equitable resolve condemnation cases for the Corridor H project.

There is no question that Fort Pleasant should, at a minimum, be precluded from discovering appraisals in condemnation matters that are pre-decisional since such materials would enjoy qualified immunity as material prepared for a completely separate proceeding. Fundamental fairness dictates that Petitioners are entitled to maintain the confidentiality of the same until at least the matter is considered closed and/or settled. This concept of qualified immunity as to pre-decisional appraisals and reports has not been addressed by this Court. However, it has been specifically addressed by the judiciary of the State of Texas.

The seminal Texas decision on this issue is *Ex parte Shepperd,* 513 S.W.2d 813 (Tex 1974). In this matter, the Texas Supreme Court was asked to determine whether a landowner was entitled to

appraisal reports prepared by the government's intended appraisal witnesses relating to other properties that were not the subject of the proceedings in which the discovery was sought. At the outset, the facts in this case are clearly distinguishable from the matter at hand since the project involved a ***non-federally assisted*** urban renewal project, so no discussion was had concerning the Federal Act. In any event, the Texas Supreme Court held that appraisals prepared by a testifying witness for other properties in a project are discoverable, except for those deemed as pre-decisional.

In reliance upon *Ex parte Shepperd*, the Texas Court of Appeals in *State By and Through Dept. of Highways and Public Transp. v. Bentley,* 752 S.W.2d 602 (Tex.App.-Tyler,1988) held that a property owner in an eminent domain proceeding was not entitled to an order compelling the state to produce appraisals and other documents relating to parcels of land comparable to his property because those parcels were the subject of either pre-condemnation negotiations or condemnation proceedings pending at trial level.[5]

While not controlling, the holdings from Texas are quite persuasive. Even if the Federal Act were not controlling in the instant matter, the appraisals and evaluations as requested by Fort Pleasant would still enjoy a qualified immunity from disclosure because they are all the subject of precondemnation negotiations or condemnation proceedings that are currently pending at trial level in Hardy County, West Virginia.

CONCLUSION

Thus, it is clearly apparent that Respondent has exceeded his judicial authority and discretion by ordering Petitioners (1) to divulge the identify and disclose all reports prepared by non-testifying experts without a demonstration by Fort Pleasant of "exceptional circumstances" and (2) to disclose

5 Again, it should be noted that although the Texas Court of Appeals held that the appraisals would be discoverable

appraisals and evaluations relating to parcels of land comparable to the subject property that were prepared for the Petitioners for the federally assisted Corridor H Project and which are subject to precondmenation negotiations or condemnation proceedings pending at trial level.

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Honorable Court issue a rule to show cause, suspend any and all proceedings in the underlying action pending the Court' s ruling herein pursuant to W. Va. Code §53-1-9; and grant a Writ of Prohibition in this matter to prohibit the Respondent from enforcing the Order of April 13, 2006.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a Public Corporation, and
FRED VANKIRK, P.E.
COMMISSIONER OF HIGHWAYS,
PETITIONERS
BY COUNSEL

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Martin & Seibert, LC
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Keyser, WV 26726

if post-condemnation, there was no mention that the project at issue involved federal funds.

VERIFICATION

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

Robert A. Amtower, the District Engineer/Manager of the West Virginia Department of Transportation, Division of Highways, named in the foregoing Petition for Writ of Prohibition, being duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information and belief, and that so far as they are stated to be upon information, he believes them to be true.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a Public Corporation,

BY: _____
ROBERT A. AMTOWER

Its: District Engineer/Manager

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Cheryl McNeill, a notary public in and for said state, do hereby certify that Robert A. Amtower who signed the writing above, bearing date the 24th day of April, 2006 for the West Virginia Department of Transportation, Division of Highways, has this day acknowledged before me the said writing to be the act and deed of said corporation.

Given under my hand this 24th day of April, 2006.

Cheryl A. McNeill
Notary Public

My Commission Expires:

12-17-09

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
CHERYL A. McNEILL
ROUTE 6, BOX 6084
KEYSER, WV 26726
My Commission Expires December 17, 2009

MEMORANDUM OF PERSONS TO BE SERVED

Persons to be served the Rule to Show Cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows:

The Honorable Donald H. Cookman
Judge - 22nd Judicial Circuit
CIRCUIT COURT OF HARDY COUNTY
P.O. Box 856
Romney, WV 26757

Lucas J. See, Esquire
Hardy County Prosecuting Attorney
204 Washington Street, Room 104
Moorefield, WV 26836

James D. Gray, Esquire
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Clarksburg, WV 26302-2190

Oscar Bean, Esquire
Bean and Bean
P.O. Box 30
Moorefield, WV 26836

Janet Ferrell, Clerk
Circuit Court of Hardy County
Hardy County Courthouse
204 Washington Street
Moorefield, WV 26836

CERTIFICATE OF SERVICE

I, Clarence E. Martin, III, Counsel for Petitioners hereby certify that I served a true copy of the foregoing ***Petition for Writ of Prohibition*** upon the following individuals, on this the **24th day of April, 2006:**

The Honorable Donald H. Cookman
Judge - 22nd Judicial Circuit
CIRCUIT COURT OF HARDY COUNTY
P.O. Box 856
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Clarence E. Martin, III